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10 **UNITED STATES BANKRUPTCY COURT**

11 **DISTRICT OF NEVADA**

12 In re: Executive Plastering, Inc.

13) Case No.: BK-S 09-33776-BAM
14) Chapter 7

15) Debtor

16) **MOTION FOR RELIEF FROM
BANKRUPTCY STAY**

17)
18) Hearing Date: February 15, 2011
19) Hearing Time: 1:30 p.m.

MOTION FOR RELIEF FROM BANKRUPTCY STAY

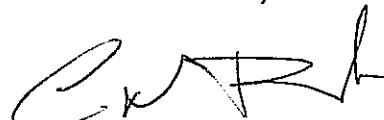
20 COMES NOW Movant/Creditor PN II, INC., d.b.a. PULTE HOMES OF NEVADA
21 (hereinafter referred to as "Movant"), by and through their attorneys of record, LEE HERNANDEZ,
22 LANDRUM, GAROFALO & BLAKE, and hereby moves this Honorable Court for an Order lifting
23 the automatic bankruptcy stay, as it applies to Debtor Executive Plastering, Inc., pursuant to 11
U.S.C. §362(d).

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1 This Motion is based upon the pleadings and papers on file with this Court, the below points
2 and authorities, and any oral argument that this Court may entertain at the time of hearing.

3 DATED this 7th day of January, 2011.

4
5 LEE, HERNANDEZ, LANDRUM,
6 GAROFALO & BLAKE, APC
7



8 By:

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28 **MEMORANDUM OF POINTS AND AUTHORITIES**

I.

FACTUAL BACKGROUND

1 The instant Motion stems from a Clark County NRS Chapter 40 construction defect matter
2 entitled Pursel v. PN II, Inc., d.b.a. Pulte Homes of Nevada (NRS 40.600 et seq. process is not yet
3 complete). The subject property is located in the Silverstone Ranch community in Las Vegas,
4 Nevada. Movant acted as the developer and/or general contractor for the Silverstone Ranch
5 community.

6 Pursuant to NRS 40.645, Movant placed each of its implicated subcontractors on notice of
7 the above-listed Claimant's respective construction defect allegations, including the Debtor,
8 Executive Plastering, Inc. (hereinafter referred to as "Debtor"). Due to the Debtor's Petition for
9 Bankruptcy under Chapter 7 of Title 11 U.S.C., which was filed on or about December 21, 2009, and
10 the resultant automatic stay pursuant to 11 U.S.C. §362, Movant is not only precluded from pursuing
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1 its third party claims Debtor, but it is also precluded from satisfying the statutory mediation
 2 requirement under NRS 40.680, which states:

3 *Except as otherwise provided in this chapter, before a claimant commences an action or
 4 amends a complaint to add a cause of action for a constructional defect against a
 5 contractor, subcontractor, supplier or design professional, the matter must be
 submitted to mediation, unless mediation is waived in writing by the contractor,
 subcontractor, supplier or design professional and the claimant.*

6 NRS 40.680(1) (emphasis added).

7 Movant is informed and believes that Debtor is insured against those damages alleged by the
 8 Claimant in the above-referenced case. Movant is further informed and believes that pursuant to its
 9 contract(s) with Debtor, Debtor purchased insurance, which will serve to indemnify Movant for any
 10 judgments that may be entered against it in the underlying construction defect matter. Movant
 11 intends to file a Third-Party Complaint against Debtor asserting the following claims: negligence,
 12 breach of express and implied warranties, implied indemnity, breach of contract, equitable
 13 indemnity, contribution, apportionment, express indemnity and declaratory relief. Through the
 14 course of litigating its claims against Debtor, Movant seeks to determine the extent of Debtor's
 15 liability, if any, and seeks recovery for any such liability from Debtor's insurance carriers only.
 16 Movant's intent is to pursue such recovery only against Debtor's insurance proceeds and not against
 17 the Debtor's other assets. As such, Movant seeks an Order from this Court lifting the automatic stay
 18 to allow it to proceed with its claims against Debtor for this limited purpose.

19 Continuance of the bankruptcy stay would result in significant prejudice to Movant's ability
 20 to defend itself in the underlying construction defect case and it would deny Movant its rights of
 21 indemnification and contribution against Debtor. Given that Movant intends to limit its pursuit of
 22 claims only against Debtor's applicable insurance policies, Debtor's personal assets will not be
 23 jeopardized and Movant's Motion to lift the bankruptcy stay should be granted by this Honorable
 24 Court.

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II.

LEGAL STANDARD

The United States Bankruptcy code provides that:

On request of a party in interest and after notice and a hearing, the court **shall** grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

11 U.S.C. § 362(d)(1) and (2) (emphasis added). “The burden of proof on a motion to modify the automatic stay is a shifting one,” in that the party seeking relief must establish a *prima facie* case that there exists cause for relief under 11 U.S.C. § 362(d)(1). In re Smith, 389 B.R. 902, 918 (Bkrtcy.D.Nev. 2008); In re Sonnax Indus., Inc., 907 F.2d 1280, 1285 (2d Cir.1990); In re Mazzeo, 167 F.3d 139, 142 (2d Cir.1999); In re Duvar Apt., Inc., 205 B.R. 196, 200 (9th Cir. BAP 1996). Once the moving party has established *prima facie* case, the burden shifts to the debtor to show that relief from the stay is unwarranted. 11 U.S.C. § 362(g)(2); In re Sonnax, 907 F.2d at 1285; In re Duvar Apt., 205 B.R. at 200.

Section 541(a) of the Code states that the debtor’s bankruptcy estate is comprised of property in which the debtor has a legal or equitable interest. 11 U.S.C. § 541(a)(1). Where there exists a bona fide dispute as to whether property is part of the bankruptcy estate, the burden is on the creditor to seek a determination from the bankruptcy court as to whether or not such property is subject to the automatic stay. In re Petit, 217 F.3d 1072, 1075 (9th Cir. 2000). If it can be shown that the debtor does not have an equity in property claimed to be part of the estate, the bankruptcy court may lift the automatic stay. In re Collins, 199 B.R. 561, 565 (Bankr.W.D.Pa.1996); 11 U.S.C. § 362(d)(2)(A).

Section 524(a) of the Bankruptcy Code explicitly renders judgments void for “... the personal

1 liability of the debtor...." 11 U.S.C. § 524(a)(1).

2 Accordingly, the statutory language, on its face, does not preclude the
 3 determination of the debtor's liability upon which the damages would be
 owed by another party, such as the debtor's liability insurance.

4 In re Jet Florida Systems, Inc., 883 F.2d 970, 973 (11th Cir. 1989).

5 The provisions of 524(a) apply only with respect to the personal liability of the debtor.
 6 *When it is necessary to commence or continue suit against a debtor in order, for*
example, to establish liability of another, perhaps a surety, such suit would not be
barred. Section 524(e) was intended for the benefit of the debtor but was not meant
to affect the liability of third parties or to prevent establishing such liability through
whatever means required.

7
 8 Id. (*citing* 3 R. Babitt, A. Herzog, R. Mabey, H. Novikoff, & M. Sheinfeld, Collier on Bankruptcy ¶
 9 524.01 at 524-16 (15th ed.1987) (emphasis added). As such, the Code does not seek to shield third
 10 parties, such as a debtor's insurers, from liability. In re Jet Florida Systems, Inc., 883 F.2d 970, 974
 11 (11th Cir. 1989).

12 III.

13 ARGUMENT

14 A. Just Cause Exists for Lifting the Automatic Bankruptcy Stay.

15 Bankruptcy courts have identified the following twelve nonexclusive factors as issues a
 16 bankruptcy court should weigh in determining whether there exists "cause" to lift the automatic stay
 17 to permit litigation to continue in another forum:

- 18 1. Whether the relief will result in a partial or complete resolution of the issues;
- 19 2. The lack of any connection with or interference with the bankruptcy
 case;
- 20 3. Whether the foreign proceeding involves the debtor as a fiduciary;
- 21 4. Whether a specialized tribunal has been established to hear the
 particular cause of action and whether that tribunal has the expertise to hear such
 cases;
- 22 5. Whether the debtor's insurance carrier has assumed full financial
 responsibility for defending the litigation;
- 23 6. Whether the action essentially involves third parties, and the debtor
 functions only as a bailee or conduit for the goods or proceeds in
 question;
- 24 7. Whether the litigation in another forum would prejudice the interests of other
 creditors, the creditors' committee and other interested parties;

- 1 8. Whether the judgment claim arising from the foreign action is subject to equitable
2 subordination under Section 510(c);
3
- 4 9. Whether Movants success in the foreign proceeding would result in a judicial lien
5 avoidable by the debtor under Section 522(f);
6
- 7 10. The interests of judicial economy and the expeditious and economical determination
8 of litigation for the parties;
9
- 10 11. Whether the foreign proceedings have progressed to the point where the parties are
11 prepared for trial, and
12
- 13 12. The impact of the stay on the parties and the "balance of hurt."

In re Smith, 389 B.R. 902, 918-919 (Bkrtcy.D.Nev. 2008). With respect to each of the
above-referenced factors:

- 1 1. Relief from the stay will allow Movant to resolve its claims of indemnification and
2 contribution against Debtor in their entirety;
- 3 2. There is no connection between the NRS Chapter 40 construction defect matter and
4 Debtor's bankruptcy case, nor will such action interfere with the bankruptcy matter;
- 5 3. The Debtor is not a fiduciary in the applicable construction defect matter;
- 6 4. A specialized tribunal is not required to hear the construction defect matters as the
7 District Court is equipped to hear the same;
- 8 5. Based on communication with Debtor's insurance carriers, it is Movant's
9 understanding that the Debtor's insurance carriers will assume responsibility for
10 Debtor's defense;
- 11 6. The construction defect matter at issue involves third party subcontractors, such as the
12 Debtor, who obtained insurance policies which name Movant as additional insured.
13 As such, the Debtor, as an insured, functions only as a conduit for the insurance
14 proceeds in question and Movant does not intend to pursue recovery against the
15 Debtor personally;
- 16 7. The construction defect matter at issue will not prejudice the interests of other
17 creditors as it is Movant's understanding that the policies in question name Movant as
18 an additional insured;
- 19 8. Judgments arising from the construction defect matters are not subject to equitable
20 subordination under Section 510(c);
21
- 22 9. Inapplicable;
- 23 10. Lifting the bankruptcy stay will serve the interests of judicial economy and the
24 expeditious and economical determination of litigation for the parties by allowing
25 Movant to negotiate settlements of all claims against Debtor with Debtor's respective
26 insurance carriers;
- 27 11. There is no trial date scheduled for the underlying construction defect matter.
- 28 12. Failure to lift the automatic stay in this matter would severely prejudice Movant in it

1 defense of the original construction defect matter, which gives rise to its claims
 2 against Debtor.

3 Based on these factors, Movant can clearly demonstrate just cause for lifting the automatic
 4 stay. Most importantly, if Movant is precluded from establishing Debtor's liability, it will be
 5 deprived of any recovery from Debtor's implicated insurers. As such:

6 ... the goals of section 524(a) would not be advanced by preventing a
 7 plaintiff from maintaining an action against the debtor in order to
 establish the debtor's liability when that was a prerequisite to recovery
 from the insurer.

8 In re Mann, 58 B.R. 953, 958 (Bankr.W.D.Va. 1986); *see also* Rowe v. Ford Motor Co., 34
 9 B.R. 680 (M.D.Ala.1983); Elliott [Elliott] v. Hardison, 25 B.R. 305 (E.D.Va.1982); Wilkinson v.
 10 Vigilant Insurance Co., [236 Ga. 456,] 224 S.E.2d 167 (1976); Johnson v. Bondurant, [187 Kan.
 11 637,] 359 P.2d 861 (1961); Miller v. Collins, [328 Mo. 313,] 40 S.W.2d 1062 (1931).

12 While Movant seeks to establish Debtor's liability, the determination of such liability will not serve
 13 to prejudice Debtor as Debtor's personal property is not subject to risk. In re Jet Florida Systems,
 14 Inc., 883 F.2d 970, 974 (11th Cir. 1989) (*citing In re Mann*, 58 B.R. 953, 958 (Bankr.W.D.Va.
 15 1986)). Movant's pursuit of claims against Debtor will only affect the assets and liability of the
 16 Debtor's implicated insurers, and will not affect the Debtor personally. In re White, 73 B.R. 983,
 17 985 (Bankr.D.Col. 1987) (*see also In re Honosky*, 6 B.R. 667 (Bankr.S.D.W.Va.1980) (Plaintiff
 18 could proceed to suit to extent of the debtor's insurance coverage); Elliott v. Hardison, 25 B.R.
 19 305-06 (E.D.Va.1982) (relief from stay appropriate given that any resulting judgment from the civil
 20 action could not be enforced against the debtor or his bankruptcy estate); In re Glen-Bern Industries,
 21 Inc., 6 C.B.C. 100, 102 (Bankr.D.Mass.1975) (although decided under § 16 Bankruptcy Act of 1898,
 22 the court reasoned that a discharge is personal to the debtor and not to accrue to the benefit of third
 23 parties who may have liability based on the bankrupt's liability); Rowe v. Ford Motor Co., 34 B.R.
 24 680 (M.D.Ala.1983)).

25 Based on the foregoing, there is just cause to lift the bankruptcy stay and permit Movant to
 26 pursue its claims against Debtor. Movant does not intend to enforce any potential judgments against
 27 the Debtor or the Debtor's estate, but rather, it intends to pursue recovery against Debtor's insurers,
 28 who are not protected by the Bankruptcy Code. 11 U.S.C. § 524 does not act to shield third parties

1 such as insurers, who are subject to liability on behalf of the Debtor. In re Jet Florida Systems, Inc.,
 2 883 F.2d 970, 974 (11th Cir. 1989). As such, this Honorable Court must grant Movant relief from
 3 the automatic stay and permit it to pursue its claims against Debtor.

4 **B. Debtor Does Not Have an Equitable Interest That Would Warrant Inclusion of**
Subject Insurance in Bankruptcy Estate.

5 Movant requests that the Bankruptcy Court lift the automatic stay in this matter so that it may
 6 proceed with its claims against Debtor for the limited purpose of establishing liability against the
 7 same and seeks recovery from the Debtor's implicated insurance carriers. In doing so, Movant seek
 8 a determination from this Court that the property in question, Debtor's insurance, is not subject to the
 9 stay. While Debtor's possessory interest in the applicable insurance policies renders such property
 10 subject to the automatic stay, Debtor does not have an equitable interest in the insurance, nor would
 11 the proceeds from the insurance benefit the Debtor in reorganization, as this is a Chapter 7
 12 bankruptcy case. In re 48th Street Steakhouse, Inc., 835 F.2d 427, 430 (2d Cir.1987).

13 The insurance at issue in this matter is commercial general liability insurance, the proceeds of
 14 which cannot be used by the Debtor to satisfy any claims other than those covered by the applicable
 15 insurance policies. This type of insurance is not akin to a life insurance policy in which a debtor may
 16 accumulate equity. As such, the insurance policies at issue here should not be subject to the
 17 automatic stay and should be excluded from the bankruptcy estate. Moreover, the Debtor will not be
 18 prejudiced by exposure to liability in this matter because:

19 [t]he Debtor and his property are not subject to any risk and maintenance
 20 of the suit does not frustrate the policy of the Bankruptcy Code in giving
 21 the Debtor a fresh start in his economic life.

22 In re Jet Florida Systems, Inc., 883 F.2d 970, 974 (11th Cir. 1989) (*citing Wimmer v. Mann (In re*
 23 Mann, 58 B.R. 953, 958 (Bankr.W.D.Va. 1986)). Movant's maintenance of its claims against
 24 Debtor will not affect the Debtor's property, nor will it impact the Debtor's economic future. As
 25 such, Movant's request that the automatic stay be lifted is warranted and should be granted by this
 26 Court.

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1 IV.
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3 **CONCLUSION**

4 Based on the foregoing, Movant requests that this Honorable Court lift the automatic
5 bankruptcy stay and permit Movant to pursue its claims against Debtor. Said relief will not affect the
6 Debtor or the Debtor's estate, as Movant seeks recovery against Debtor's insurers, who are not
afforded protection under the Bankruptcy Code.

7 DATED this 15 day of January, 2011.

8 **LEE, HERNANDEZ, LANDRUM,
9 GAROFALO & BLAKE, APC**

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